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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-641

WESTERN INTERNATIONAL HOTELS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-31) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1972. The petition for a writ of certiorari was filed on October 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a corporation may be held criminally responsible under the antitrust laws for the conduct

of its agents within the actual, implied and apparent scope of their employment, even though that conduct may be contrary to the corporation's actual instructions or to its stated policies.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the antitrust laws, 15 U.S.C. 1, 16 and 24, are set forth at Pet. App. 32–34. In addition, Section 8 of the Sherman Act, 26 Stat. 210, 15 U.S.C. 7, provides:

> The word "person", or "persons", whenever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

STATEMENT

The Greater Portland Convention Association (GPCA) was organized in 1959 to aid the Chamber of Commerce of Portland, Oregon, in attracting conventions to the city (Pet. 3–4). Its members included operators of hotels, restaurants, hotel and restaurant supply companies, and similar businesses in and around Portland (Pet. 4). The association was financed by contributions requested from its members according to a formula whereby hotel supply companies were assessed an amount equal to one percent of their sales to hotel members (Pet. App. 15–16).

A grand jury indictment charging violation of Section 1 of the Sherman Act (15 U.S.C. 1) was returned against petitioner and three other firms, all of which

operate hotels in Portland, and the managers of those hotels. The indictment charged them with conspiring to restrain interstate commerce by granting preferential treatment to suppliers who paid their GPCA assessments, and by threatening to curtail purchases from those who did not (Pet. 3). The defendants originally pleaded not guilty, but subsequently each defendant, except petitioner and its Portland manager, changed their pleas to *nolo contendere*.

The criminal antitrust charges as to the two remaining defendants were tried to a jury. During the trial, petitioner's president testified that it would be contrary to corporate policy to condition purchases upon payment of a contribution to a local association by the supplier. The Portland manager and his assistant testified that it was the hotel's policy to purchase supplies solely on the basis of price, quality and service and that on two occasions they instructed the hotel's purchasing agent that he was not to become involved in any type of boycott. The purchasing agent confirmed the receipt of these instructions, but admitted that, despite them, he had threatened a supplier with loss of the hotel's business unless the supplier paid the GPCA assessment. He testified that he violated his instructions because of anger and personal pique toward the individual representing the supplier (Pet. App. 20).

Petitioner's request, based on this testimony, for instructions absolving it from criminal liability for the unauthorized acts of its agents (Pet. App. 35–36) was denied. Instead, the court instructed the jury

(Pet. App. 35) that a corporation is liable for the actions of its agents "within the scope of their employment," which it defined to include acts within the agents' actual, implied, or apparent authority. The court added that (*ibid.*) a corporation is responsible for acts and statements of its agents done or made within the scope of their employment, "even though [the agents'] conduct may be contrary to their actual instructions or contrary to the corporation's stated polic[ies]."

The jury found petitioner guilty but its Portland manager not guilty. Petitioner was fined $10,000 plus the costs of prosecution. The court of appeals unanimously affirmed. Based upon the authorities and the policy justifications for corporate criminal responsibility under the antitrust laws (Pet. App. 20–28), it concluded that "as a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent" (Pet. App. 27).

ARGUMENT

This case presents no question warranting review by this Court. The legislative purpose embodied in the Sherman Act requires that a corporation be legally responsible for the actions of its agents taken in the interest of the corporation, and within their actual or apparent authority, even though contrary to general corporate policy or express instructions. There is no conflict among the courts of appeals.

There is no occasion here to consider whether, as a general matter, a corporation may be held criminally responsible for the illegal acts of its agents in its behalf. Criminal statutes imposing liability on corporations are numerous and varied. Since corporations can only act through agents, concepts of corporate criminal responsibility for such acts are shaped by the policies of the particular statute imposing that responsibility. Where regulation of business activity is the primary legislative purpose, the offense is merely a misdemeanor and specific intent is not an element, the standard of corporate responsibility obviously must be strict if the statute is to be an effective deterrent to corporate misconduct.

The Sherman Act, of course, is primarily concerned with the commercial activities of business entities. In 1890 the corporation was, as it is now, the most significant mode of commercial enterprise. See *New York Central & Hudson R.R.* v. *United States*, 212 U.S. 481, 495; *Regan* v. *Kroger Grocery & Baking Co.*, 54 N.E. 2d 210, 219 (S.Ct. Ill.) Since specific intent is not an element of an offense under Section 1,[1] the corporation may be held criminally responsible for its agents' act in its behalf even though there has not been specific authorization, toleration or ratification of those acts. See *Standard Oil Company of Texas* v. *United States*, 307 F. 2d 120, 125 (C.A. 5).

[1] *United States v. Griffith*, 334 U.S. 100, 105; *United States* v. *Paramount Pictures*, 334 U.S. 131, 173; *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 522; *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614.

This principle is simply a realistic reflection of modern business conditions. Corporations characteristically conduct their affairs through complex business structures involving extensive delegation of authority. They exert great pressure upon their managing agents to maximize profits. This, in turn, may encourage highly profitable, but illegal, conduct that suppresses competition in the interest of the corporation. The immediate fruits of such violations inure to the benefit of the corporate entity, not the individual agent. As this Court has declared, "The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment." *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 126. Thus, it is reasonable and appropriate that the corporation should also share the responsibility.

This Court has many times recognized the important public interest protected by the Sherman Act. See *e.g.*, *United States* v. *Topco Associates*, 405 U.S. 596; *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1. The criminal provisions of the Act play a vital deterrent role in safeguarding the public from the most pernicious forms of injury, such as price fixing and other naked restraints of trade. This deterrent effect depends upon the possibility of *both* individual and corporate liability.

It is not a sufficient deterrent to rely only on remedies against individual agents, particularly where, as under the Sherman Act, the offense is only a misdemeanor and penalties actually imposed on individuals

tend to be relatively light. The threat of individual conviction in such circumstances may be ineffective because of the strong economic pressures within the corporation on the individual to maximize profits, and the fact that an offense under the Sherman Act often does not involve behavior which is condemned as highly immoral by the individual's associates. Furthermore, juries recognize that the social consequences of a criminal conviction may fall with a disproportionately heavy impact on the individual defendant and are therefore often reluctant to hold him responsible for acts as to which his corporation was the principal beneficiary.[2] On the other hand, few individuals are willing to jeopardize their business careers by engaging in acts for which their corporate employer may be held criminally responsible even if the individuals are not. To a corporation which values its goodwill, as well as to its agents, therefore, the threat of conviction and fine for the agents' misconduct can have a deterrent effect far greater than the often remote possibility of individual liability.

A rule limiting corporate responsibility to cases of actual authorization or ratification, or gross negligence in supervision would greatly impair the Sherman Act's effectiveness. Merely by issuing general expressions of policy and instructions to its agents, a corporation could effectively insulate itself from all responsibility. For example, the purchasing agent involved here was granted broad authority by petitioner

[2] See ALI Model Penal Code, Comments on § 2.07, Tentative Draft No. 4, p. 149 (155).

to purchase supplies. He was also directed by petitioner's managing agent actively to solicit suppliers to pay their G.P.C.A. assessments. He was, therefore, in a unique position to add the corporation's buying power to the force of the boycott.[2] As the court below stated, "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks" (Pet. App. 27–28).

Two courts of appeals have directly considered the issue herein presented. *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 149–151 (C.A. 6); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 204–205 (C.A. 3), certiorari denied, 401 U.S. 948. Each case involved the conviction of a corporation under Section 1 of the Sherman Act. In each case, the corporation had issued policy statements and instructions to its agents which it claimed absolved it from responsibility. However, in each case the conviction was upheld and jury instructions prac-

[2] No indictment was brought against the purchasing agent here involved. However, this fact in no way affects the corporation's criminal responsibility. *United States* v. *Van Allen*, 28 F.R.D. 329, 345 (S.D.N.Y.); *United States* v. *Detroit Sheet Metal & Roofing Contractors Ass'n*, 116 F. Supp. 81, 91 (E.D. Mich.). Nor does the acquittal of the managing agent provide petitioner any defense. *Magnolia Motor & Logging Co.* v. *United States*, 264 F. 2d 950, 953 (C.A. 9); *Southern Advance Bag & Paper Co.* v. *United States*, 133 F. 2d 449, 450–451 (C.A. 5). See *United States* v. *Dotterweich*, 320 U.S. 277, 279; *Dunn* v. *United States*, 284 U.S. 390, 393; Final Report of the National Commission on Reform of Federal Criminal Laws § 402(2); 1 Working Papers of the National Commission on Reform of Federal Criminal Laws, 172 (1970).

tically identical to the ones petitioner here attacks were specifically approved.[4]

John Gund Brewing Co. v. *United States*, 204 Fed. 17 (C.A. 8); *Holland Furnace Co.* v. *United States*, 158 F. 2d 2 (C.A. 6), and *Nobile* v. *United States*, 284 Fed. 253 (C.A. 3), relied on by petitioner, are not in conflict. The language of the Third Circuit in the *Nobile* case (Pet. 11), was only a dictum which the same court subsequently rejected in *United States* v. *Armour & Co.*, 168 F. 2d 342, 344, n. 2. In *Holland Furnace*, the court of appeals dealt with a statute that specifically made "reasonable reliance" and good faith a complete defense. The court made clear that its

[4] In non-Sherman Act contexts, several other courts of appeals have held that instructions to agents or general expressions of policy cannot shield a corporation from criminal responsibility for the actions of its agents within the scope of their employment. *United States* v. *Armour & Co.*, 168 F. 2d 342, 343 (C.A. 3); *C.I.T. Corporation* v. *United States*, 150 F. 2d 85, 89 (C.A. 9); *Egan* v. *United States*, 137 F. 2d 369, 379 (C.A. 8), certiorari denied, 320 U.S. 788. It has been suggested that the general rule under existing federal law "purports to authorize liability for the act of any agent of the corporation within the area of duties or functions entrusted to him, at least if he is acting in furtherance of, rather than against, the interest of the corporation." 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 164 (1970). See, also, New York Penal Law § 20.20, subd. (2) (c). This standard appears to differ from the American Law Institute's draft Model Penal Code, 1 Working Papers, *supra* at 172. Compare ALI Model Penal Code, Proposed Official Draft § 2.07 (1962). Even under the draft Code, however, the defense that the corporation's managing agents exercised due diligence to prevent the offense is not available "if plainly inconsistent with the legislative purpose in defining the particular offense." § 2.07(5). We submit that this is the case under the Sherman Act.

decision turned largely *"on the facts of this case"* (158 F. 2d at 8, emphasis in original), which differ significantly from the facts here. Whatever support *Holland Furnace* might have provided to petitioner's position disappears in light of the Sixth Circuit's more recent opinion in *Continental Baking Co.* v. *United States, supra,* which involved almost the identical question of corporate responsibility presented here and reached the same result.

The Eighth Circuit's 1913 decision in *John Gund Brewing Co., supra,* involved a statute far different from the Sherman Act. A corporation was convicted of selling malt liquor in a particular town without a government license, based on shipments its agent had made to fictitious consignees there. The corporation was not permitted to show that the shipments violated its express instructions. The court of appeals reversed and remanded for a new trial. It held even though the statute did not require a showing of unlawful intent by the corporation for acts of its agent within the scope of his authority, the corporation could nevertheless show that the agent had violated its good faith instructions.

While the court used broad language, its holding turned on the particular statute and conduct in issue. This may be seen by comparing *Gund* with the Eighth Circuit's later decision in *Egan* v. *United States,* 137 F. 2d 369, 379, certiorari denied, 320 U.S. 788, which held a corporation liable, without regard to its policies and instructions, for illegal political contributions by its agent. Moreover, *Gund* was decided at a time

when corporate criminal responsibility was still relatively new to federal jurisprudence. The opinion relied solely on decisions of state courts, which it characterized as being in irreconcilable conflict. Since 1913, federal law on the question of corporate criminal responsibility has fully developed. See, *supra*, p. 9, n. 4.

Under the Sherman Act, the corporation's criminal responsibility for acts of its agent arises not out of *respondeat superior* alone, but also out of the corporation's obligations under the statute to the public. Private instructions by a corporation to its agent do not affect the apparent authority upon which the public must rely. Nor, as we have shown, are they as effective as the threat of corporate criminal responsibility in deterring violations of the Sherman Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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